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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN ARMSTRONG, et al.,
Plaintiffs,
v.
GRAY DAVIS, et al.,
Defendants.

No. C-94-2307-CW

Third Amended Complaint
Class Action

A. NATURE OF ACTION

1. This is a civil rights action, brought on behalf of
state prisoners and parolees with certain disabilities, for

FILED

APR - 7 1999

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

1 declaratory and injunctive relief. State officials and the
2 California Board of Prison Terms (BPT) discriminate against
3 plaintiffs and the class they represent by reason of their
4 disability. Defendants have constructed, renovated, purchased or
5 leased facilities, including approximately twenty prisons, that
6 are not accessible to prisoners or parolees with mobility
7 impairments. Defendants do not have adequate policies or
8 practices that enable them to identify, assess or reasonably
9 accommodate individuals with disabilities so that these
10 individuals can participate in the programs and activities that
11 they are otherwise qualified for. Defendants have failed to
12 provide class members with visual, hearing and other impairments
13 with auxiliary aids and services to ensure effective
14 communication so that they can participate in programs and
15 activities, including emergency warnings. Defendants BPT and
16 Nielsen have failed to provide class members with adequate
17 assistance at parole hearings so that they have adequate notice
18 of the proceedings and the issues therein and can effectively
19 participate in the hearings.

20 2. Plaintiffs and the class they represent bring this
21 action under 42 U.S.C. sections 1983, 12101 et seq. and 29 U.S.C.
22 section 794 and the Due Process Clause of the Fourteenth
23 Amendment against California officials who have responsibility
24 for, and complete control over, the programs and activities
25 provided to plaintiffs, and who have responsibility for, and
26 complete control over, the construction of prison facilities
27 since 1968. Defendants have repeatedly and persistently denied
28 the plaintiff class equal and sufficient access to programs and

1 activities run by defendants thereby subjecting them to unlawful
2 discrimination and a denial of due process. Defendants have been
3 and are engaging in a policy and practice of violating federal
4 requirements in the design and construction of its new, renovated
5 and/or remodeled facilities in California. Defendants' conduct
6 constitutes an ongoing and continuous violation of federal law,
7 and unless restrained from doing so, defendants will continue to
8 violate federal law. Therefore, plaintiffs seek declaratory and
9 injunctive relief to remedy the illegal conditions and practices
10 to which they and the class of others similarly situated are
11 subjected.

12 B. PARTIES

13 (1) Plaintiffs

14 3. Plaintiffs and the class they represent are
15 individuals, under the custody and control of the California
16 Department of Corrections, who have mobility, sight, hearing,
17 learning and kidney and developmental impairments, that
18 substantially limit one or more of their major life activities.
19 They have been denied access to the programs, services and
20 activities run by defendants and have been confined in or use
21 facilities operated by and under the control of the California
22 Department of Corrections. All plaintiffs are "individuals with
23 disabilities" as that term is defined in Section 504 of the
24 Rehabilitation Act of 1973 [hereinafter referred to as "Section
25 504"], 29 U.S.C. section 706(8), and the Americans With
26 Disabilities Act [hereinafter referred to as the "ADA"], 42
27 U.S.C. section 12102(2).
28

1 4. Plaintiff John Armstrong, E-46263, is currently housed
2 at California Medical Facility at Vacaville. Mr. Armstrong has a
3 visual impairment.

4 5. Plaintiff Judy Fendt, W-25026, is currently housed at
5 Central California Women's Facility. Ms. Fendt uses a wheelchair
6 and/or a leg prosthesis because her right leg has been amputated.

7 6. Plaintiff Walter Fratus, H-41663, is currently housed
8 at High Desert State Prison. Mr. Fratus uses a wheelchair
9 because his legs are paralyzed. Mr. Fratus also has partial
10 paralysis of his arms.

11 7. Plaintiff Gregory Sandoval, D-86282, was housed at
12 California State Prison at Solano and is currently on parole.
13 Mr. Sandoval has a hearing impairment.

14 8. Plaintiff Flora Abrams, W-46127, is currently on
15 parole. Ms. Abrams has a learning disability that defendants BPT
16 and Nielsen did not reasonably accommodate, inter alia, when she
17 waived her right to parole revocation hearings on numerous
18 occasions.

19 9. Plaintiff Joey Gough, C-18465, is currently housed at
20 the California Men's Colony. Mr. Gough has a learning disability
21 that defendants BPT and Nielsen did not reasonably accommodate,
22 inter alia, at his screening offers, parole revocation hearings,
23 and related procedures.

24 10. Plaintiff Timothy Whisman, D-66127, is currently on
25 parole. Mr. Whisman has a learning disability that defendants
26 BPT and Nielsen failed to reasonably accommodate: he did not
27 understand many of the documents he signed for the BPT and when
28

1 he requested an attorney, the BPT denied the request despite
2 having knowledge of his learning disability.

3 11. Plaintiff David Rose, J-10638, is currently housed at
4 Deuel Vocational Institution. Mr. Rose has a hearing impairment.
5 Defendants BPT and Nielsen failed to provide reasonable
6 modifications for his disability and equally effective
7 communication during the parole revocation process.

8 12. Plaintiff David Blessing, H-45928, is currently housed
9 at the Wasco State Prison Reception Center. Mr. Blessing is
10 hearing impaired. Defendants BPT and Nielsen failed to provide
11 reasonable modifications for his disability and equally effective
12 communication during the parole revocation process.

13 13. Plaintiff Elio Castro, D-36836, is currently housed at
14 Avenal State Prison. Mr. Castro is hearing impaired. Defendants
15 BPT and Nielsen failed to provide reasonable modifications for
16 his disability and equally effective communication at his parole
17 suitability and other lifer hearings.

18 14. Plaintiff Elmer Umbenhowe, D-45928, is currently
19 housed at Deuel Vocational Institution. Mr. Umbenhowe is
20 mobility impaired. Defendants BPT and Nielsen failed to provide
21 reasonable modifications for his disability during the parole
22 revocation process.

23 15. Plaintiff Raymond Hayes, C-82229, is currently housed
24 at Salinas Valley State Prison. Mr. Hayes is mobility impaired.
25 Defendants BPT and Nielsen failed to provide reasonable
26 modifications for his disability at his parole suitability and
27 other lifer hearings.
28

1 16. Plaintiff Gene Horrocks, C-08859, is currently housed
2 at Avenal State Prison. Mr. Horrocks is mobility impaired.
3 Defendants BPT and Nielsen failed to provide reasonable
4 modifications for his disability at his parole suitability and
5 other lifer hearings.

6 17. Plaintiff Kiah Mincey, C-74063, is currently on parole.
7 Mr. Mincey is vision impaired. Defendants BPT and Nielsen
8 failed to provide reasonable modifications for his disability
9 during the parole revocation process.

10 18. Plaintiff Clifton Feathers, C-63845, is currently
11 housed at the California Institution for Men. Mr. Feathers is
12 vision impaired. Defendants BPT and Nielsen failed to provide
13 reasonable modifications for his disability at his parole
14 suitability hearings and other lifer hearings.

15 19. Plaintiff Willie Johnson, E-81930, is currently housed
16 at Avenal State Prison. Mr. Johnson is vision impaired.
17 Defendants BPT and Nielsen failed to provide reasonable
18 modifications for his disability at his parole documentation
19 hearings.

20 20. Plaintiff David Badillo, H-49189, is currently housed
21 at Wasco State Prison. Plaintiff is developmentally disabled.
22 Defendants BPT and Nielsen failed to provide reasonable
23 modifications for his disability at parole revocation
24 proceedings.

25 21. Plaintiff James Simmons, C-79287, is currently housed
26 at California Mens Colony. Plaintiff is developmentally
27 disabled. Defendants BPT and Nielsen failed to provide
28

1 reasonable modifications for his disability at life parole
2 consideration hearings.

3 2) Defendants

4 22. Gray Davis is the Governor of the State of California
5 and the Chief Executive of the state government. He is sued
6 herein in his official capacity. As Governor he is obligated
7 under state law to supervise the official conduct of all
8 executive and ministerial officers and to see that all offices
9 are filled and their duties lawfully performed. Defendant Davis
10 has control over the monies allocated to California Department of
11 Corrections by submitting a budget and by exercising his
12 authority to veto or sign legislation appropriating funds for
13 prison construction and renovation and prison and parole
14 programs. Defendant Davis has the authority to appoint and
15 remove the subordinate defendants named herein. Defendant Davis
16 retains the ultimate state authority over the care and treatment
17 of the plaintiff class, and is responsible for ensuring that all
18 programs, activities and services operated by and under the
19 control of the California Department of Corrections comply with
20 Section 504 and the ADA.

21 23. Defendant Robert Presley is Secretary of the Youth and
22 Corrections Agency of the State of California and is sued herein
23 in this capacity. The Youth and Corrections Agency supervises
24 the operation of the California Department of Corrections.

25 24. Defendant Cal A. Terhune is the Director of the
26 California Department of Corrections and is sued herein in that
27 capacity. The Department of Corrections is responsible for the
28 operation of the California state prison and parole system,

1 including the construction of prison facilities and the provision
2 of accessible programs and activities to individuals with
3 disabilities.

4 25. Defendant Susanne Steinberg, M.D. is the Deputy
5 Director for Health Care Services for the California Department
6 of Corrections and is sued in that capacity. As Deputy Director,
7 Dr. Steinberg is responsible for supervising the development and
8 implementation of a system of individual assessment of a
9 prisoner's disability, including his or her ability to perform
10 daily living tasks and job responsibilities.

11 26. Defendant Judith McGillivray is Deputy Director of the
12 Planning and Construction Division for the California Department
13 of Corrections and is sued in that capacity. As Deputy Director,
14 Ms. McGillivray is responsible for supervising the planning and
15 construction of new prisons and for renovations of existing
16 prisons. Ms. McGillivray failed to perform his responsibilities
17 under Section 504 and the ADA.

18 27. Defendant David Tristan is Deputy Director of the
19 Institutions Division for the California Department of
20 Corrections and is sued in that capacity. As Deputy Director,
21 Mr. Tristan is responsible for ensuring that all programs,
22 activities and services operated by and under the control of the
23 California Department of Corrections comply with Section 504 and
24 the ADA.

25 28. Defendant Midge Carroll is Deputy Director of the
26 Parole and Community Services Division for the California
27 Department of Corrections and is sued in that capacity. As
28 Deputy Director, Ms Carroll is responsible for ensuring that all

1 programs, activities and services operated by and under the
2 control of the California Department of Corrections for parolees
3 comply with Section 504 and the ADA.

4 29. Defendant California Board of Prison Terms (BPT) is
5 responsible for conducting various types of hearings to determine
6 whether and under what conditions a prisoner or parolee should
7 remain or be released on parole, be incarcerated in a prison or
8 be involuntarily confined at a treatment facility after serving a
9 sentence of imprisonment.

10 30. Defendant James Nielsen is the Chairman of the BPT and
11 is sued in that capacity. As Chairman, Mr. Nielson is
12 responsible for the operations of the BPT and must ensure that
13 all programs, activities and services operated by the BPT comply
14 with Section 504 and the ADA.

15 C. JURISDICTION

16 31. This court has jurisdiction under 28 U.S.C. sections
17 1331 and 1343. Plaintiffs seek declaratory and injunctive relief
18 under 28 U.S.C. sections 1343, 2201 and 2202, 29 U.S.C. section
19 794(a) and 42 U.S.C. sections, 1983, 12117(a).

20 D. VENUE

21 32. Venue is appropriate in this Court under 28 U.S.C.
22 section 1391(b), because a substantial part of the events or
23 omissions giving rise to plaintiffs' claims occurred within the
24 Northern District of California.

25 E. CLASS ACTION ALLEGATIONS

26 33. Plaintiffs bring this action on their own behalf and,
27 pursuant to Rule 23(b)(1) and Rule 23(b)(2) of the Federal Rules
28 of Civil Procedure, on behalf of all prisoners and parolees with

1 mobility, sight, hearing, learning, kidney and developmental
2 disabilities, as defined in 29 U.S.C. section 706(8)(A) and 42
3 U.S.C. section 12102, who are now, or will in the future be,
4 under the custody of the California Department of Corrections.

5 (a) The exact size of the class is unknown to the
6 plaintiffs but they believe there are thousands of class members
7 and the size of the class is so numerous that joinder of all
8 members is impracticable;

9 (b) The conditions, practices and omissions that form
10 the basis of this complaint are common to all members of the
11 class and the relief sought will apply to all of them.

12 (c) The claims of the plaintiffs are typical of the
13 claims of the entire class.

14 (d) The prosecution of separate actions by individual
15 members of the class would create a risk of inconsistent and
16 varying adjudications which would establish incompatible
17 standards of conduct for the defendants.

18 (e) The prosecution of separate actions by individual
19 members of the class would create a risk of adjudications with
20 respect to individual members which would, as a practical matter,
21 substantially impair the ability of other members to protect
22 their interests.

23 (f) Defendants have acted or refused to act on grounds
24 generally applicable to the class, making appropriate injunctive
25 and declaratory relief with respect to the class as a whole, or
26 to particular subclasses.

27 (g) There are questions of law and fact common to the
28 members of the class including defendants' violations of the

1 Americans with Disabilities Act, and Section 504 of the
2 Rehabilitation Act of 1973 because of denial of the benefit of
3 and discrimination in access to programs and activities for
4 individuals with disabilities.

5 (h) The named plaintiffs are capable, through counsel,
6 of fairly and adequately representing the class and protecting
7 its interests because they are individuals with disabilities who
8 suffer from, among other things, defendants' violations of the
9 Americans with Disabilities Act, Section 504 of the
10 Rehabilitation Act of 1973 and the Due Process Clause, as set
11 forth in plaintiffs' statement of Class Claims.

12 **F. STATEMENT OF CLASS CLAIMS**

13 34. The California Department of Corrections and the Board
14 of Prison Terms receives federal financial assistance as that
15 term is used in 29 U.S.C. section 794(b)(1)(A).

16 35. The California Department of Corrections has spent
17 billions of public dollars since the 1960's building new prisons
18 and renovating its existing facilities. Defendants built and
19 renovated almost every existing prison since state accessibility
20 laws were passed in the 1960's and since federal accessibility
21 laws were passed in the 1970's. The Planning and Construction
22 Division of the California Department of Corrections is
23 responsible for the planning and construction of these
24 institutions.

25 36. Both Section 504 and the ADA require that all new
26 building and any renovation or remodeling comply with federal
27 accessibility standards. 29 U.S.C. section 794(a); 42 U.S.C.
28 sections 12132, 12133 and 12134(b); 28 C.F.R. sections 35.149,

1 35.151, 41.57(B) and 41.58(a). Defendants built and renovated
2 prisons that fail to comply with these standards found in the
3 Uniform Federal Accessibility Standards [hereinafter referred to
4 as "UFAS"]. 41 C.F.R. Pt.101-19.6. As a result of their failure
5 to comply with federal law, defendants have expended billions of
6 dollars to build facilities that must be renovated in order to
7 meet federal accessibility standards. 28 C.F.R. section 35.151
8 (a)-(c). This waste of public monies was both unnecessary and
9 unconscionable.

10 37. As a result of defendants' unlawful failure to comply
11 with federal accessibility standards, plaintiffs have been
12 delayed in their transfer to institutions that can accommodate
13 their disabilities and have been excluded from the educational,
14 vocational, work furlough and work credit, recreational,
15 visiting, classification, disciplinary and emergency programs and
16 services that defendants offer to individuals under their custody
17 and control.

18 38. Despite the clear mandate of Section 504 and the ADA,
19 defendants have failed to adequately evaluate the BPT's current
20 services, policies and practices to determine the extent to which
21 modification of its services, policies and practices is required,
22 and have failed to develop policies and practices for
23 implementing such modifications. 29 U.S.C. section 794(a); 42
24 U.S.C. section 12134(b); 28 C.F.R. sections 35.105, 35.150(d),
25 41.5(b)(2), 41.57(c) and 42.505(c).

26 39. For those individuals with disabilities who have self-
27 identified, defendants have failed to make individualized
28 assessments of their ability to participate in work, educational,

1 vocational, and recreational programs and services offered by
2 defendants, and, as a result, have excluded individuals who were
3 otherwise qualified to participate in these programs by reason of
4 their disabilities and not their abilities in violation of
5 federal law. 29 U.S.C. section 794(a); 42 U.S.C. sections
6 12112(b) and 12132; 28 C.F.R. sections 35.130 (a)-(b)(8) and
7 41.51.

8 40. Defendants have failed to make reasonable
9 accommodations to individuals with disabilities in the programs,
10 activities, services, benefits, and jobs they offer to
11 individuals under their custody and control. 29 U.S.C. section
12 794(a); 42 U.S.C. sections 12111(9) and 12132; 28 C.F.R. sections
13 35.150(b)(7) and 41.53.

14 41. Defendants continue to engage in a policy and practice
15 of violating federal accessibility requirements in the design and
16 construction of its current projects, including new and renovated
17 prison facilities in California. Defendants continue to engage
18 in a policy and practice of failing to develop adequate policies
19 and practices for providing the plaintiff class with reasonable
20 access to programs, activities and services available generally
21 to other individuals under their custody and control.

22 Defendants' conduct constitutes an ongoing and continuous
23 violation of Section 504 and the ADA and, unless restrained from
24 doing so, defendants will continue to violate the law.

25 42. Defendants have failed to furnish appropriate auxiliary
26 aids and services where necessary to afford plaintiffs and
27 members of the plaintiff class the opportunity to participate in
28 the programs, activities, services, benefits, and jobs they offer

1 to individuals under their custody and control. 29 U.S.C.
2 section 794(a); 42 U.S.C. sections 12132 and 12134(b); 28 C.F.R.
3 sections 35.160-35.163. In addition to being denied access to
4 many of defendants' programs, plaintiffs and members of the
5 plaintiff class have been endangered during emergencies in the
6 prison as a result of defendants' failure to take appropriate
7 steps to ensure that communications with them are as effective as
8 communications with other prisoners. Id.

9 43. By denying plaintiffs and the plaintiff class with
10 meaningful access to programs and facilities that they are
11 otherwise qualified to participate in, and by denying plaintiffs
12 and the plaintiff class the benefits of participation in programs
13 and activities that they are otherwise qualified to participate
14 in, and by failing to reasonably accommodate plaintiffs and the
15 plaintiff class, thereby subjecting them to discrimination,
16 defendants have violated Section 504 and the ADA.

17 44. Defendants BPT and Nielsen have failed to provide
18 reasonable modifications to policies, practices, and procedures
19 for disabled prisoners and parolees in Board of Prison Terms
20 hearing processes. Hearing processes include, but are not
21 limited to, notices and other documents received prior to the
22 hearing, the actual hearing, any hearing waiver offer, any
23 preparation by the prisoner or parolee for the hearing, any
24 conditions or recommendations made by the BPT at the hearing and
25 any appeal or grievance submitted regarding the hearing.
26 Defendant's discriminatory actions include, but are not limited
27 to, a failure to ensure equally effective communication, a
28 failure to provide auxiliary aids and services, a failure to

1 ensure accessible hearing locations and a failure to provide
2 effective assistance at the hearings.

3 45. By repeatedly and persistently denying plaintiffs and
4 the plaintiff class with appropriate assistance prior to, during
5 and after the hearings, defendants BPT and Nielsen have violated
6 the Due Process Clause of the Fourteenth Amendment.

7 46. By repeatedly and persistently denying plaintiffs and
8 the plaintiff class with facilities that comply with federal
9 accessibility standards, defendants have violated Section 504 and
10 the ADA.

11
12 **G. PRAYER FOR RELIEF**

13 WHEREFORE, plaintiffs pray that this Court:

14 A. Declare the suit is maintainable as a class action
15 pursuant to Federal Rule of Civil Procedure 23(b)(1) and
16 23(b)(2);

17 B. Adjudge and declare that the conditions,
18 practices, and omissions described above are in violation of the
19 rights of the plaintiffs and the class they represent under
20 Section 504 of the Rehabilitation Act of 1973 and the Americans
21 with Disabilities Act of 1991.

22 C. Preliminarily and permanently enjoin defendants,
23 their agents, employees and all persons acting in concert with
24 them, from subjecting plaintiffs and the class they represent to
25 the illegal conditions, practices and omissions described above;

26 D. Order defendants to end their practices of denying
27 individuals with disabilities the benefits of, excluding them
28 from participation in, and subjecting them to discrimination

1 under programs and activities provided by the California
2 Department of Corrections and the Board of Prison Terms;

3 E. Order defendants to reasonably accommodate the
4 special needs of individuals with disabilities;

5 F. Order defendants to makes its existing and future
6 facilities in California readily accessible to and usable by
7 individuals with disabilities as required under Section 504 of
8 the Rehabilitation Act of 1973 and the Americans with
9 Disabilities Act of 1991 and the regulations promulgated
10 thereunder;

11 G. Order defendants BPT and Nielsen to provide
12 adequate assistance to plaintiffs and the plaintiff class in a
13 manner consistent with the Due Process Clause of the Fourteenth
14 Amendment;

15 H. Award plaintiffs, pursuant to 29 U.S.C. section
16 794(b), 42 U.S.C. sections 1988 and 42 U.S.C. section 12205, the
17 costs of this suit and reasonable attorneys' fees and litigation
18 expenses;

19 H. Retain jurisdiction of this case until defendants
20 have fully complied with the orders of this Court, and there is a
21 reasonable assurance that defendants will continue to comply in
22 the future absent continuing jurisdiction; and

23 I. Award such other and further relief as the Court
24 deems just and proper.

25 Dated: April 6, 1999

26
27 

28 DONALD SPECTER
Attorneys for Plaintiffs

DECLARATION OF SERVICE BY MAIL

Case Name: Armstrong v. Davis No. C-94-2307-CW

I am employed in the County of Marin, California. I am over the age of 18 years and not a party to the within entitled cause: my business address is Prison Law Office, General Delivery, San Quentin, California 94964.

On April 6, 1999, I served the attached

THIRD AMENDED COMPLAINT CLASS ACTION

in said cause, placing, or causing to be placed, a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at San Rafael, California, addressed as follows:

George Prince
Office of the Attorney General
50 Fremont Street, Suite 300
San Francisco, CA 94105-2239

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Rafael, California on April 6, 1999.



Edie DeGraff